No. 94-1615

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

In re
ZODIAC INVESTMENT, INC.,

Debtor.

[redacted]NIA POZZOLAN, INC. and EDWARD SCHARF,

Petitioners,

vs.

ZODIAC INVESTMENT, INC.,
PATRICK C. CLARY and RONALD A. KASTANEK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT ZODIAC INVESTMENT, INC.

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QUESTION PRESENTED

The question presented for review is whether the Ninth Circuit Court of Appeals committed error in its determination of what constituted the law of the case determined by the Bankruptcy Appellate Panel of the Ninth Circuit in a previous appeal, and in rendering a decision which is in conflict with its decision in a previous appeal from the Bankruptcy Appellate Panel in the same case.

PARTIES TO THE PROCEEDINGS

Zodiac Investment, Inc., Glen C. Nelson, Trustee for Zodiac Investment, Inc., Debtor, Patrick C. Clary, Ronald A. Kastanek, California Pozzolan, Inc., and Edward Scharf.

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ZODIAC INVESTMENT, INC.,

Debtor.

CALIFORNIA POZZOLAN, INC. and EDWARD SCHARF,

Petitioners,

vs.

ZODIAC INVESTMENT, INC., PATRICK C. CLARY and RONALD A. KASTANEK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT ZODIAC INVESTMENT, INC.

Respondent, Zodiac Investment, Inc., opposes the Petition of California Pozzolan, Inc. (now Cal Pumice Inc.) and Edward

Scharf for a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals filed December 23, 1994 on the grounds that there is *no conflict* between this decision and prior appellate decisions of the Ninth Circuit Court of Appeals and the Bankruptcy Appellate Panel.

OPINIONS BELOW

The Order of the Ninth Circuit Court of Appeals, filed January 20, 1995, denying the petition for rehearing is Appendix A to Petitioners' Brief.

The Memorandum Opinion of the Ninth Circuit Court of Appeals filed December 23, 1994, is Appendix B to Petitioners' Brief.

The Judgment and the Memorandum Opinion of the Bankruptcy Appellate Panel of the Ninth Circuit filed November 22, 1993, is Appendix C to Petitioners' Brief.

The Judgment and the Memorandum Opinion of the Ninth Circuit Court of Appeals filed March 31, 1992, is Appendix D to Petitioners' Brief.

The Judgment and the Memorandum Opinion of the Bankruptcy Appellate Panel of the Ninth Circuit filed October 11, 1990, is Appendix E to Petitioner's Brief.

STATEMENT OF JURISDICTION

1. The judgment to be reviewed is December 23, 1994.

2. The date of the order denying Respondents' motion for rehearing is January 20, 1995.

3. This Court has jurisdiction to review the judgment of the Ninth Circuit Court of Appeals as set forth in 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Cal Pumice Inc. and its sole owners, Edward Scharf (hereafter "Scharf") entered into a scheme with the prior owners of Zodiac Investment, Inc., (hereafter "Zodiac") to defraud Zodiac's creditors by conveying certain mining claims, known as the "Margie mining claims" to Scharf to prevent Zodiac's creditor, David E. Hoover (hereafter "Hoover") from whom Zodiac obtained the claims, from obtaining a return of the claims through the bankruptcy proceedings. (Petitioners' Appendix D, p. 3, ¶3).

While holding these Margie mining claims in trust, as a constructive trustee, Scharf together with Zodiac and Hoover were sued by Bonnie Osuna (hereafter "Osuna") who claimed to own mining claims conflicting with the Margie claim, referred to in the lawsuit as the "Osuna mining claims".

Both Zodiac and Hoover were in bankruptcy proceedings at the time and could not be sued by Osuna without obtaining relief from stay. Scharf and Osuna agreed to dismiss Hoover and Zodiac from the lawsuit (without informing them of the dismissal) and to proceed with the lawsuit between themselves and to allow a judgment to be entered in favor of Osuna. Once judgment was entered, Scharf purchased the Osuna mining claims from Osuna in order to assert them against Zodiac's and Hoover's ownership of the Margie claims in violation of his constructive trustee capacity.

Zodiac, who had filed for bankruptcy protection in 1982 in the State of Nevada bankruptcy courts, sued for return of the

claims and damages. During the pendency of the litigation, Scharf caused his corporation, Cal Pumice, Inc. to transfer the claims to himself in order to put them beyond the reach of the bankruptcy court and also failed to provide a proper accounting for which the trial court ordered sanctions in the form of attorney fees.

The court ultimately ordered Scharf to transfer the Osuna mining claims to Zodiac, ordered Scharf to pay sanctions and damages to Zodiac and created a joint venture between the parties under its equity powers. Scharf appealed to the Bankruptcy Appellate Panel (hereafter "BAP").

A. The 1990 BAP Opinion of October 11, 1990 (Petitioners' Appendix E)

On October 11, 1990, the BAP issued its decision in which it "reversed the *finding* of joint venture" (emphasis added). In its opinion the BAP did not discuss sanctions nor did it discuss restitution of the Osuna mining claims to Scharf in its decision, even though these issues were before the BAP. It *did not* reverse the entire judgment of the trial court, it reversed *only* the "finding of joint venture". (*See* Petitioners' Appendix E, p. 19, last three lines of the paragraph).

Neither the trial court nor the Ninth Circuit Court of Appeals considered this decision to be a reversal of the entire judgment of the trial court.

B. The 1992 Ninth Circuit Opinion of March 31, 1992 (Petitioners' Appendix D)

The decision of the Ninth Circuit Court of Appeals on March 31, 1992 affirmed the BAP and adopted its "reasoning and result" which reasoning and result only dealt with the reversal of the *finding of joint venture.* The Ninth Circuit Court also interpreted

the BAP opinion by stating that the parties "come before us with less than clean hands. The transfer undergirding this case had as its objective the defrauding of Zodiac's creditors" (Petitioners' Appendix D, p. 3 last paragraph) and further stated that "The BAP's Memorandum of *Opinion and Judgment* do not address any of the bankruptcy court's orders requiring the parties to convey title to mining claims" (Petitioners' Appendix D, p. 4, ¶ 2).

Scharf's motion to the trial court for restitution of claims and for accounting was denied on the ground that both the BAP decision of October 11, 1990 and the Ninth Circuit decision of March 31, 1992 constituted only a partial reversal of its prior judgment and that neither judgment reversed the sanctions ordered and the Ninth Circuit has specifically stated that the BAP opinion did not address the issue of restitution of mining claims.

C. The 1993 BAP Opinion of November 22, 1993 (Petitioners' Appendix C)

The BAP reversed the trial court's supplemental orders ordering payment of sanctions and denying restitution of claims stating merely that:

> The decision rendered by this panel on October 10 (Sic) 1990 was meant to be a general reversal of the order of the bankruptcy court. Unfortunately, we did not explicitly state the necessary consequences of reversal of the trial court's fundamental premise that there was no joint venture.

(Petitioners' Appendix C, p, 9, ¶ 3).

The BAP did not address any issues raised on appeal, but merely stated that the prior opinion was incomplete.

D. The Ninth Circuit Court of Appeals Opinion of December 23, 1994 (Petitioners' Appendix B)

The Ninth Circuit Court of Appeals reversed the BAP opinion and judgment of November 22, 1993 and reinstated the supplemental judgments of the trial court stating that: "The BAP misapplied our holding (in the March 31, 1993 decision) in the BAP's most recent decision (BAP November 22, 1993 decision) concluding that reversal of a finding of joint venture necessitates a reversal of the orders awarding sanctions and transfer of mining claims to Zodiac. The BAP's conclusion exceeds the directives of our judgment." (Petitioners' Appendix B, p. 8, ¶ 3).

The Ninth Circuit goes on to state that sanctions stand completely independent of the existing joint venture (*Pan Pacific Low Ball Television, Co. v. Pacific Union*, 897 F.2d 594, 596 (9th Cir. 1993)) and were not timely challenged and that the BAP's October 11, 1990 opinion "failed to address the trial court's orders requiring the parties to convey title to mining claims". (1992 Ninth Circuit Opinion at 2). The BAP is wholly without authority to "correct" what it apparently perceived as our misunderstanding of its prior decision" (Petitioners' Appendix B, p. 9, ¶ 3).

The Ninth Circuit then recognizes that the trial court had been motivated by equitable concerns when it ordered the original transfer of the claims from Scharf to Zodiac and that these same equitable concerns governed the trial court's "persistent refusal to transfer the claims back to Scharf or Cal Pumice". (Petitioners' Appendix B, p. 9, ¶ 3) and further stated "The bankruptcy court's orders were fully supported by the facts and the law" (Petitioners' Appendix B, p. 10).

REASONS FOR DENYING THE WRIT

Petitioners' fail to recognize the fact that an appellate decision is determinative of only those issues addressed in the opinion (*De Pinto v. Landoe*, 411 F.2d 297 (9th Cir. 1969); *New York Life Insurance Company v. Gomer*, 106 F.2d 375 (9th Cir. 1939).

In the appeal that resulted in the October 11, 1990 BAP opinion, numerous issues were raised in the appeal, including sanctions, restitution of claims and damages. The BAP ignored all issues except the issue of joint venture and then reversed the "finding of joint venture" only. The BAP therefore chose to make no ruling as to restitution of claims or sanctions and the decision rendered did not state that the trial court's judgment was reversed, only that the "finding" of joint venture was reversed.

The Ninth Circuit, in its December 12, 1994 decision, specifically points out the fallacy of Petitioners' reasoning that the 1990 and 1992 decisions constituted a reversal of "the entire judgment" and states: "Here, the 1990 BAP reversal and our affirmance of it adjudicated, and is therefore conclusive, *only on the issue of joint venture*" (emphasis added) (Petitioners' Appendix B, p. 7, ¶ 2).

Petitioners' misconstrue the decisions as conflicting opinions when in fact no conflict exists, except in the mind of Petitioners', who repeatedly assert that the BAP's 1990 ruling was a reversal of the "entire judgment". Petitioners' are incorrect in this assertion. What the BAP intended in its 1990 decision and what it actually did are two different things. I has no jurisdiction to correct a perceived error by rendering a second opinion after the Ninth Circuit has reviewed the case.

Based upon the explanation of the Ninth Circuit in its

December 23, 1994 decision, neither it, not the trial court understood the 1990 BAP decision to be a reversal of the "entire judgment" of the trial court and based thereon it rendered its 1992 decision and the 1994 decision, which are the only opinions of importance in this case.

Based on the above, it is obvious that this case is not appropriate for review under Rule 17.1(a) or any other rule.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: April 24, 1995

Respectfully submitted,

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